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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LANE RICHARD ROSE, Defendant and Appellant.	D052760 (Super. Ct. No. SCD203701)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III and Cynthia Bashant, Judges. Affirmed.

A jury convicted defendant Lane Richard Rose of numerous offenses[1] based on evidence seized after he was arrested by police. The only issue on appeal is whether Rose's motion under Penal Code section 1538.5 seeking suppression of that evidence was erroneously denied.

1 The nature of the offenses are not germane to the issue raised on appeal.

FACTUAL AND PROCEDURAL BCKGROUND

The Evidence

On March 5, 2007, at approximately 4:20 a.m., San Diego Police Officer Kevin Conkle was dispatched to investigate a report that a person was slumped over the steering wheel of a car parked in the parking lot of a Home Depot store. The individual reportedly had been in the vehicle since midnight. None of the businesses near the parking lot were open.

Officer Conkle drove to the site, approached the car and saw Rose slumped over the steering wheel. Officer Conkle wanted to make sure Rose was not in distress, so he knocked on the driver's side window and, after a few seconds, Rose looked at him. As a second officer (Officer James) arrived to assist Officer Conkle, Rose opened the driver's door. Officer Conkle asked Rose if everything was okay. Rose responded he had been parked there since 10:00 p.m. the prior evening and had slept in his car waiting for Home Depot to open. Officer Conkle asked Rose to step out of his car and show some identification. Rose produced his driver's license and stated he lived "pretty close" to Home Depot.

Officer Conkle was concerned by the circumstances. He did not know if anything was wrong with Rose, whether he was trespassing on Home Depot property, whether he had been waiting there to hurt someone, or whether he was there for some other reason. Officer Conkle was also concerned because Rose claimed he was sleeping in his car to wait for the store to open, even though Rose lived close to the store and there was no apparent reason to be sleeping in the parking lot. Officer Conkle was concerned that

whatever he was investigating could involve potential danger to himself or others, and therefore asked Rose to step out of the vehicle to conduct a patdown search.

Officer Conkle patted down Rose and, through a handheld radio, ran an inquiry on Rose's name. Three to five minutes after Conkle's initial contact with Rose, dispatch informed Conkle that Rose had an outstanding felony arrest warrant for burglary. Conkle arrested Rose and then searched his car incident to the arrest. The search yielded the evidence on which Rose's convictions were based.

Rose's version of the encounter with Conkle differed in some respects from Officer Conkle's version. He asserted he was a plumber and was at Home Depot to purchase parts for a job. He got there at 4:00 a.m. (believing it opened at 5:00 a.m. because "they do switch times" during daylight savings time) and slept while waiting for it to open. When Officer Conkle approached his car, he told the officer he was waiting for the store to open and stated he was fine. Rose gave Officer Conkle his driver's license, and before he got out of the car, Officer James walked over to the passenger side and shone a flashlight into the car. Rose claimed Officer James stated they tried three times to check Rose's identity, and only after the third attempt dispatch reported the outstanding arrest warrant. Rose claimed the only basis for the warrant could have been that he had written a check to Costco but mistakenly used a check from a closed bank account, and that he had repaid Costco in early February.

Motion to Suppress

Rose argued, after Officer Conkle determined he was awake and not in distress, any further detention was unreasonable and therefore the subsequent search was

unreasonable, particularly because the arrest warrant was invalid; it should have been "cleared" after Rose repaid Costco. The People argued the initial encounter was proper, both as a welfare check and because there were articulable facts suggesting Rose was trespassing on private property and may have had improper motives, and the discovery of the outstanding arrest warrant after a brief detention validated the subsequent search. The court ruled there was no evidence the arrest warrant was invalid, or any evidence Officer Conkle knew the warrant was invalid at the time he arrested Rose. The court found the initial encounter was proper both as a welfare check and because the officer had facts on which to conclude Rose had slept overnight at the parking lot, "which is not permitted," and Officer Conkle was entitled to investigate and "find out exactly what [was] going on" and whether Rose was there for an improper purpose, particularly when Officer Conkle learned Rose lived nearby, creating a reasonable suspicion of Rose's proffered explanation. The court found these suspicions entitled Officer Conkle to ask for identification and determine who Rose was and whether there was some issue of which Conkle should be aware. Because the information informing Officer Conkle there was a valid arrest warrant was received in a reasonable amount of time, the subsequent arrest and search was justified.

ANALYSIS

Standard of Review

The Fourth Amendment of the United States Constitution protects persons against unreasonable searches and seizures, and applies to California through the Fourteenth Amendment of the United States Constitution's due process clause. (*People v. Williams*

(1999) 20 Cal.4th 119, 125.) If the challenged police conduct is shown to be violative of the Fourth Amendment, the exclusionary rule requires that evidence obtained as a result of that conduct be suppressed. (*People v. Williams* (1988) 45 Cal.3d 1268, 1299.)

A defendant may move to suppress pursuant to Penal Code section 1538.5. The appellate standard of review regarding trial court rulings on a Penal Code section 1538.5 motion to suppress is well established. We defer to the trial court's findings of fact, whether express or implied, if those findings are supported by substantial evidence because "[a]s the finder of fact in a proceeding to suppress evidence [citation], the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. [Citation.] Accordingly, in reviewing the instant suppression order, we consider the record in the light most favorable to [Rose] since 'all factual conflicts must be resolved in the manner most favorable to the [trial] court's disposition on the [suppression] motion.' [Citation.]" (*People v. Woods* (1999) 21 Cal.4th 668, 673-674.)

Although we defer to the trial court's express and implied factual findings if supported by substantial evidence, we exercise our independent judgment in determining the legality of a search on the facts so found. Accordingly, we examine the facts most favorably to the ruling but independently assess whether, as a matter of law on the facts so found, the challenged search or seizure conforms to constitutional standards of reasonableness. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 327.)

B. Analysis

This matter is substantively indistinguishable from, and is controlled by, *People v Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*).[2] The *Brendlin* court examined whether a defendant who had been unlawfully detained was entitled to suppress the fruits of a search conducted *after* the officers determined there was an outstanding arrest warrant for the defendant, arrested him and conducted the search incident to the arrest. In *Brendlin*, the defendant was a passenger in a car a deputy stopped for expired registration tags, which stop was subsequently determined to be an unlawful stop and detention. When the deputy approached, he looked inside the car and saw containers of substances used to produce methamphetamine. He asked the defendant to identify himself and defendant complied. The deputy returned to his patrol car and learned the defendant had an outstanding arrest warrant. After back-up arrived, the defendant was arrested, the car was searched incident to the arrest, and contraband was found. (*Brendlin, supra*, 45 Cal.4th at pp. 265-266.)

The *Brendlin* court evaluated "whether the existence of defendant's outstanding arrest warrant--which was discovered *after* the unlawful [detention] but *before* the search

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2 The parties' initial briefing focused on whether the evidence should be suppressed as the product of a detention that, although initially justified, became unlawful because Officer Conkle unnecessarily prolonged the encounter without sufficient basis. However, we solicited additional briefing on the impact of *Brendlin*, decided after the parties' opening briefs had been filed, to determine whether *Brendlin* mooted inquiry into the legality of the extended detention. Although we have substantial doubt the circumstances were insufficient to warrant some brief investigation by Conkle, it is unnecessary to resolve that issue because we conclude the motion to suppress was properly denied under *Brendlin*.

of his person or the vehicle--dissipated the taint of the illegal seizure and rendered suppression of the evidence seized unnecessary." (*Brendlin, supra*, 45 Cal.4th at p. 267, fn. omitted.) The court acknowledged, but for the unlawful detention, police would not have discovered the outstanding warrant for defendant's arrest and would not then have conducted the search incident to arrest that produced the contraband. However, *Brendlin* cautioned, "[t]his does not mean . . . that the fruits of the search incident to that arrest must be suppressed." (*Id.* at p. 268.) Instead, the suppression motion must instead be evaluated by applying the case law (developed in both the federal courts and in California) on "attenuation," which examines " 'whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality.' (*United States v. Crews* (1980) 445 U.S. 463, 471 [63 L.Ed.2d 537, 100 S.Ct. 1244].)" (*Brendlin,* at p. 269.)

Brendlin acknowledged the issue of whether the existence of an outstanding arrest warrant attenuates the taint of an antecedent unlawful seizure was a question of first impression in California. However, *Brendlin* recognized the federal courts (as well as courts in other states) have applied the three general factors on attenuation enunciated in *Brown v. Illinois* (1975) 422 U.S. 590: "the temporal proximity of the unlawful seizure to the subsequent search of the defendant's person or vehicle, the presence of intervening circumstances, and the flagrancy of the official misconduct in effecting the unlawful seizure" (*Brendlin, supra*, 45 Cal.4th at p. 269), to evaluate "whether the discovery of an outstanding arrest warrant has attenuated the taint of an antecedent unlawful seizure."

(*Ibid.*) *Brendlin* applied the three *Brown* factors and concluded "the outstanding warrant, which was discovered prior to any search of defendant's person or of the vehicle, sufficiently attenuated the taint of the unlawful traffic stop." (*Brendlin*, at pp. 269-270.)

Considering the factor of the temporal proximity of the unlawful seizure to the subsequent search of the defendant's person or vehicle, *Brendlin* noted only a few minutes elapsed between the unlawful traffic stop and the discovery of the warrant that led to the arrest and search incident to arrest. *Brendlin* concluded, under these circumstances, the temporal proximity of the unlawful seizure to the subsequent search was either irrelevant to attenuation or was outweighed by the other two factors. (*Brendlin, supra*, 45 Cal.4th at p. 270.) As to the second factor--the presence of intervening circumstances--*Brendlin* noted "the case law uniformly holds that an arrest under a valid outstanding warrant--and a search incident to that arrest--is an intervening circumstance that tends to dissipate the taint caused by an illegal traffic stop." (*Id*. at p. 271.) *Brendlin* reasoned a warrant is not reasonably subject to interpretation or abuse and supplies the legal authority for arresting a defendant independent of the circumstances that led the officer to initiate the unlawful detention. Accordingly, *Brendlin* concluded that because "no search of defendant's person or of the vehicle was undertaken until [the deputy] had confirmed the existence of the outstanding warrant [citations,] [t]he challenged evidence was thus the fruit of the outstanding warrant, and was not obtained through exploitation of the unlawful [detention]." (*Ibid.*)

Brendlin then examined the third factor--the flagrancy of the official misconduct in effecting the unlawful seizure--and concluded the evidence did not justify suppression

based on flagrant misconduct. *Brendlin* observed that the fact the detention was determined to be unlawful is *not* the equivalent of showing flagrant misconduct, because a *mistaken* belief by an officer that he or she has cause to detain the defendant does not establish that the detention was pretextual or in bad faith. Although the facts might later be determined to have been insufficient to justify the detention, "the insufficiency was not so obvious as to make one question [the deputy's] good faith in pursuing an investigation of what he believed to be a suspicious registration, nor does the record show that he had a design and purpose to effect the stop 'in the hope that something [else] might turn up.' ([Quoting *Brown v. Illinois*, *supra*, 422 U.S. at p. 605; citations].) In particular, there is no evidence at all that the deputy 'invented a justification for the traffic stop in order to have an excuse to run [a] warrant check[ ]' (*People v. Rodriguez* [(2006) 143 Cal.App.4th 1137, 1143]) or that a search of the vehicle or its occupants was the 'ultimate goal' of the initial unlawful detention. [Citations.]" (*Brendlin, supra*, 45 Cal.4th at pp. 271-272.)

In this case, as in *Brendlin*, only a few minutes passed between the time Rose was subjected to an allegedly unlawful detention and the discovery of the outstanding arrest warrant, and Officer Conkle searched Rose's person and car as a proper search incident to the arrest only after he discovered a valid outstanding warrant for Rose's arrest.[3] Even

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3 Rose seeks to distinguish *Brendlin* by asserting that, because Rose testified Officer James shone his light into Rose's car before the arrest warrant was discovered, the search commenced *before* discovery of the warrant. Of course, the court was not required to credit Rose's version of the facts. More importantly, that *same* fact was present in

assuming the initial encounter with Rose evolved into an unlawful detention, the discovery of the outstanding arrest warrant permitted police to arrest Rose, and they searched Rose's person and car only after they arrested him under a valid outstanding arrest warrant, and therefore any alleged taint was attenuated under *Brendlin*.

Rose argues the police conduct was flagrant, within the meaning of *Brendlin,* to warrant suppression of the evidence, because the absence of any articulable facts even remotely suggesting a need for further investigation demonstrates Officer Conkle was not acting in good faith but was instead motivated by the purpose of running a warrant check " 'in the hope that something [else] might turn up' " (*Brendlin, supra*, 45 Cal.4th at p. 271), which would then retroactively validate Conkle's goal of searching Rose's car. However, Rose concedes Conkle was fully justified in initially contacting Rose to check on his welfare. Moreover, we conclude under *Brendlin* that the mere fact an officer asks the detainee to identity himself and thereafter runs a warrant check does not show the officer acted in bad faith and with the goal of running a warrant check " 'in the hope that something [else] might turn up' " to permit a search. Although we have evaluated Rose's appellate arguments on the *assumption* the permissible encounter in fact evolved into an illegal detention when the encounter was prolonged, the trial court found Rose's answers and conduct raised legitimate concerns that Conkle was entitled to pursue. We are persuaded that, at a minimum, the facts found by the trial court further obviate Rose's

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Brendlin: the officers there looked inside the car before they discovered the warrant. (*Brendlin, supra*, 45 Cal.4th at pp. 265-266.)

claim that Conkle's conduct demonstrated he was acting in bad faith and asked Rose for his identity solely as a pretext to undertake a fishing expedition.

We conclude under *Brendlin* that, even assuming arguendo Rose was unduly detained based on insufficient cause, the discovery within minutes of the outstanding arrest warrant attenuated any alleged taint because the search followed and was incident to a lawful arrest.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.